based on regulation 9 of the new regulations, which reads as follows:—

"Subject to the provisions of these regulations an award of the Industrial Arbitration Tribunal shall be final and conclusive and shall not be challenged, appealed against, reviewed, quashed or called in question in any court."

I ruled against the preliminary objection because it seemed clear to me from a line of authorities that the wording of regulation 9 did not suffice to prohibit applications for *certiorari*, whether on the ground of error of law on the face of the record or excess or lack of jurisdiction (see *R.* v. *Medical Appeal Tribunal, Ex-parte Gilmore* (1)). In *R.* v. *Northumberland Compensation Appeal Tribunal, Ex-parte Shaw* (2) Lord Goddard C.J. said:—

"Many statutes took away *certiorari* in respect of the matters with which those statutes dealt, but that *certiorari* was taken away never debarred the court from granting *certiorari* if a question of jurisdiction arose; the justices or inferior tribunal could not give themselves jurisdiction, and if they had purported to give themselves jurisdiction which they had not, *certiorari* would lie to quash their order, because they had no jurisdiction to make it. The taking away of *certiorari* by statute prevented the court of King's Bench, no doubt, from inquiring into what I may call the merits of the determination. That power was taken away and the decision of the inferior court was to be regarded as final on its merits. But that did not prevent the court of King's Bench from inquiring whether or not the inferior court had any jurisdiction to make the order at all. I think that is the explanation why one finds many instances in the books where, although by a statute such decision was not to be removed into any court by writ of *certiorari* or otherwise, *certiorari* has been granted in respect of that very matter, but only on the ground of want of jurisdiction."

The main ground for the application was that the tribunal constituted under the old regulations had no power to carry on the proceedings after 31st December, 1965, as it was not constituted in accordance with the provisions of the new regulations. It was contended that the effect of the repeal of the old regulations was to render it obligatory for the proceedings carried out under the old regulations to be suspended and the matter to be commenced *de novo*.

In my judgment there was no merit in this application. The alleged trade dispute was reported to the Minister of Labour under the old regulations, under regulation 4(1) of which the decision of the Minister as to whether a dispute had been so reported to him was conclusive for all purposes, and the dispute was properly referred to the tribunal under regulation 4(4). The Industrial Arbitration Tribunal which commenced to hear the dispute was duly constituted under the old regulations.

With the repeal of the old regulations and the coming into force of the new regulations on 23rd September, 1965, the proceedings commenced before the tribunal were deemed for all purposes to be proceedings under the new regulations by virtue of the proviso to regulation 17 of the new regulations. To say otherwise would be to render nugatory the effect of that proviso. The effect of that proviso, to my mind, was that the tribunal constituted under the old regulations became a tribunal under the new regulations, notwithstanding the difference in the mode of constitution under the two regulations. In other words, as from 23rd September, 1965, the dispute before the tribunal was to be deemed as if it were a dispute referred to the tribunal under the new regulations and the tribunal itself was to be deemed as if it were a tribunal constituted under the new regulations.

There is no dispute as to the appointment of the chairman both under the old regulations and the new regulations. The appointment under the old regulations was made *vide* G.N. 2444/65 and under the new regulations *vide* G.N. 1009/66. The other members of the tribunal were on the panels appointed both under G.N. 2444/65 and G.N. 1009/66. By reason of the proviso to regulation 17 of the new regulations the panel appointed under the old regulations was deemed to be a panel appointed under the new regulations. I would go so far as to say that the effect of the saving clause contained in the proviso was to assimilate into the new regulations the old regulations in so far as they applied to any act commenced under the old regulations.

There were a number of other grounds in support of the application. They were not seriously pursued, and in my opinion none of them impinged on the question as to whether or not the tribunal had acted without jurisdiction or exceeded its jurisdiction.

For the reasons stated, I dismissed the application with costs.

Application dismissed.

Solicitors: *Braddell & Ramani; Skrine & Co.*

TAY CHEO v. CHOW NGIA

[F.C. (Barakbah L.P., Ismail Khan & Ali J.J.) February 18, 1967]

[J.B. — Federal Court Civil Appeal No. X15 of 1966]

Practice and Procedure — Jurisdiction of magistrate's courts — Claim for arrears of rent — Party raising question of title — Magistrate exercising jurisdiction under s. 90 — Courts Ordinance, 1948, ss. 70(4) & 90.

Landlord & Tenant — Tenant in possession — Estopped from denying landlord's title — Evidence Ordinance, 1950, s. 116.

The question raised in this appeal was whether the magistrate had exceeded his jurisdiction in hearing the case. In a claim for arrears of rent by the appellant in respect of premises let to the respondent, the respondent denied that the landlord had any title to the land. The preliminary point as regards jurisdiction was resolved by the magistrate in ruling that as he was not acting under section 70 of the Courts Ordinance, he had

jurisdiction to hear the case. Evidence for the defence was heard, and the magistrate gave judgment for the appellant. This was set aside on appeal on the ground that as a question of title was in dispute, the magistrate had no jurisdiction to hear the case. On appeal to the Federal Court,

Held: (1) the question of jurisdiction in this case depended on whether it was open to the respondent to raise the question of title, having regard to the nature of the action before the trial court. There were at least two reasons why it could not be raised. First, by reason of the provisions of section 116 of the Evidence Ordinance, a tenant in possession is estopped from denying the landlord's title. Secondly, in this monetary claim for rent, the magistrate was exercising his jurisdiction conferred by section 90 and not section 70(1) of the Courts Ordinance. The respondent could not invoke the provisions of section 70(4) in order to oust the jurisdiction of the magistrate;

(2) the fact that the trial magistrate after ruling that section 70 of the Courts Ordinance did not apply admitted evidence which disclosed a dispute as to title did not alter the legal position of the parties. The appeal is allowed and the judgment of the trial magistrate restored.

Case referred to:—

(1) *Hiew Kim Swee* v. *G. C. Gomes* [1955] M.L.J. 170.

FEDERAL COURT.

D. A. Devadason for the appellant.

H. B. Ball for the respondent.

Ali J.: This is an appeal from the decision of Dato' Azmi J. (as he then was) who in the exercise of his appellate jurisdiction set aside the judgment obtained by the appellant in the magistrate's court at Segamat. In setting aside the judgment the learned appeal judge held that the magistrate should have come to the decision that the question of title might well be involved and that this question would have to be seriously considered and he should have formed the opinion that his jurisdiction was at an end. At the trial the respondent had taken the point of jurisdiction by raising the question of title although the appellant's action was only a simple money claim for rent. The question of jurisdiction in this case undoubtedly turned on the effect of subsection (4) of section 70 of the Courts Ordinance which the trial magistrate held was not applicable having regard to the nature of the action before him. Before dealing with the real question requiring determination in the present proceedings I shall set out briefly the events leading to this appeal.

In the statement of claim filed on 22nd September, 1964, the appellant as landlord claimed from the defendant as tenant arrears of rent in respect of premises No. 13 Jalan Sultan, Bukit Siput, Segamat, for the period of 11 months from the 1st November, 1963, to 30th September, 1964, at $25 per month. The respondent in his statement of defence denied that he was a tenant and expressly contended that as he was the registered proprietor of the land on which the premises stand, the relationship of landlord and tenant between him and the appellant did not exist. When the action came up for trial the preliminary point concerning jurisdiction was raised by the respondent's counsel and this led to the trial magistrate hearing evidence to determine whether or not he had jurisdiction. At the conclusion of the appellant's evidence he ruled he had jurisdiction on the ground that section 70 did not apply to the action before him as he was not exercising jurisdiction under that section. In the event he proceeded to hear the evidence of the defence and at the conclusion of the case gave judgment for the appellant. The respondent appealed to the High Court and from the notes of argument before the learned appeal judge it seems clear that the respondent's only contention was that as the appellant did not have a title to the land on which the premises stand, any contract to which she was a party purporting to give rise to the relationship of landlord and tenant was invalid. From the arguments the learned appeal judge seems to have assumed that the only question before him was whether there was a *bona fide* question of title involved in the action. This assumption was apparently based on the supposition that it was open to the respondent to raise the question of title. With respect I think this is the vital question in this case, i.e. that before proceeding to consider whether there was a *bona fide* question of title involved in the action it must first be decided whether it was open to the respondent to raise the question of title, particularly having regard to the nature of the action before the trial court. In my judgment there are at least two reasons why it was not open to the respondent to raise the question of title in this case. Firstly, he is estopped from denying the landlord's title by reason of the provisions of section 116 of the Evidence Ordinance. He could, if he wished, have challenged the validity of the tenancy agreement (Exhibit P.2) on the ground of fraud, misrepresentation or probable mistake in order to show that he and the appellant do not stand in the relationship of landlord and tenant. The onus of proof in such an event would be that as governed by section 109 of the Evidence Ordinance. The respondent did not, however, choose to challenge the validity of the agreement on any of these grounds for his main contention was that the agreement was void because the appellant had no title to the land. Turning to section 116 of the Evidence Ordinance the principle contained in that section is stated in *Sarkar* on Evidence, 10th Edition, at page 1022, as follows:—

"The most ordinary instance of estoppel by *matter in pais*, is the well-established rule that a tenant, during his possession of premises, shall not deny that the landlord, under whom he had entered, or from whom he has taken a renewal of his holding, and to whom he has paid rent, had title at the time of his admission. Thus, whether the landlord brings ejectment, or an action for rent or for use and occupation against his tenant, the

defendant can neither set up the superior title of a third person, nor show that the landlord has no title. . . . The only course which a tenant can pursue, who wishes to set up title in himself superior to that of the landlord under whom he entered, is to yield up the premises, and then bring an action to recover them. So strict is this rule, that, even should a landlord, while proving his own case in an action against the tenant for use and occupation, disclose the fact that he himself has only an equitable or a joint estate in the premises, the tenant cannot avail himself of that circumstances as a defence to the action."

The same rule operates in England as stated in *Foa's* General Law of Landlord and Tenant, 8th Edition at page 471:—

"It is a principle of general application, originally applicable to leases by specialty, but extended by analogy to parol tenancies that a tenant is estopped from disputing the title of his landlord and a landlord is estopped from asserting, as against his tenant, that he (the landlord) had no title to make the demise."

Further down the page there also appear the following words:—

"This principle — which prevents a landlord from being called upon by his tenant to prove his title — applies generally, e.g. in actions for rent, or upon other covenants of the lease, or for use and occupation, actions of trespass, of replevin, and of ejectment;"

Nowhere does it appear from the record that the trial magistrate or the learned appeal judge had given consideration to the applicability of this principle although on each occasion reference was made to section 116 by counsel for the appellant. As the point was again taken before us I think it is necessary to decide whether the rule of estoppel as contained in section 116 of the Evidence Ordinance applies to this case as to preclude the respondent from denying the title of the appellant. It is abundantly clear from the evidence that there was between the parties a written tenancy agreement (Exhibit P.2). The respondent had admitted that he signed this agreement which in terms provide that he as a tenant would pay the appellant as a landlord a monthly rent of $25 for occupying the premises. Notwithstanding the express provisions of section 92 of the Evidence Ordinance he was allowed to give evidence which in effect contradicted the express terms of the agreement. He stated that he understood the document to be an agreement to pay the loan within 5 years. Although he admitted that he had been paying $25 per month up to the end of October, 1963, he claimed that these payments were towards interest charged on the loan. The trial magistrate, however, concluded that the agreement (Exhibit P.2) was a valid tenancy agreement and that it had the effect of establishing the existence of the relationship of landlord and tenant between the parties. With this conclusion I find it difficult to disagree. Therefore accepting the finding of the trial magistrate as correct and accepting the fact that the premises in question is immovable property (there is no dispute on this question) I feel compelled to say that it was not open to the respondent to deny the appellant's title. If the same view had been taken by the trial magistrate or by the learned appeal judge, no evidence of a dispute as to title could have come before the court, and consequently no question of jurisdiction could have arisen.

The second reason, and I consider this to be the more important of the two, which compels me to the view that it was not open to the respondent to raise the question of title, is the nature of the action which was before the trial magistrate. The trial magistrate had clearly stated in the course of the trial and also in his grounds of judgment that section 70 of the Courts Ordinance did not apply, having regard to the circumstances of the case before him. Sub-section (1) of this section creates an exception to the rule contained in paragraph (a) of section 69 of the Courts Ordinance inasmuch as it confers on sessions courts and magistrates courts (see section 93(1)) jurisdiction to try an action or suit for the recovery of possession of immovable property. This jurisdiction is subject to the restriction imposed in sub-section (4) of the section which requires the subordinate court to refrain from exercising jurisdiction where in its opinion there is a *bona fide* question of title involved in the action or suit. The applicability of this sub-section can only arise if the court is being called upon to exercise jurisdiction under sub-section (1), that is to say jurisdiction over an action for the recovery of possession of immovable property. But the fact of the matter was that the trial magistrate was not called upon to exercise jurisdiction under sub-section (1) for the action before him was only a money claim for rent. I do not think it can seriously be argued that there is no difference between an action for rent and an action for possession of immovable property. Indeed sub-section (2) of section 70, which permits the addition of a claim for rent in an action for possession, fairly recognises the difference between the two. The jurisdiction, which was being exercised by the trial magistrate was, in my view, one conferred by section 90 of the Ordinance. In terms of what have been stated above there cannot be any doubt that it was not open to the respondent to invoke the provisions of sub-section (4) of section 70 in order to oust the jurisdiction of the trial magistrate. It was unfortunate, however, that having ruled that section 70 did not apply, the trial magistrate should have allowed evidence which, as it was, disclosed a dispute as to title. Such wrongful admission of evidence cannot, in my opinion, alter the legal position of the parties. For the reasons stated this appeal should be allowed and the judgment of the trial magistrate restored.

At the trial as well as before the learned

appeal judge reference was made to the judgment of Thomson J. (as he then was) in *Hiew Kim Swee* v. *G. C. Gomes.*[1] The headnote to the report clearly suggests that this was an action for possession and what was said in that case could have no application to the facts of the present case. It was cited by counsel for the respondent at the commencement of the trial as though it was an authority for the proposition that the magistrate should hear the case in order to decide whether or not he had jurisdiction. What in effect was decided by the former Lord President is clearly stated in the words of his judgment appearing on page 174:—

"As this is the first occasion on which this question of jurisdiction has been litigated, I think I should make it clear for the benefit of magistrates who will, no doubt, look to what I have said that I am not deciding that in every case it is necessary for the magistrate to try the case out to the very end before deciding whether or not he has jurisdiction. What I am deciding is that the question is not necessarily and exclusively to be decided on the pleadings."

If sufficient consideration had been given to these words it might well be that the trial magistrate would have been in a position to decide the question of jurisdiction on the pleadings alone after taking into account the effect of section 116 of the Evidence Ordinance or the applicability of sub-section (4) of section 70 of the Courts Ordinance having regard to the nature of the claim. I am not saying that the trial magistrate had seriously erred in deciding to hear evidence, but what happened after the evidence was given was to bring into the open a dispute as to title which led the learned appeal judge to the view that the trial magistrate had no jurisdiction in the case. In the course of his judgment in the case cited the former Lord President gave three sets of circumstances to illustrate the stage at which the trial magistrate should consider his jurisdiction to be at an end. None of the circumstances given can be said to be analogous to the circumstances of the present case, assuming of course that the question of title could properly be raised. Having said this I do not think there is anything else to be said about that case.

I would allow this appeal with costs and order that the respondent shall pay the costs of the appeal before the learned appeal judge and of the trial before the magistrate.

Barakbah L.P. and **Ismail Khan J.** concurred.

Appeal allowed.

Judgment of the trial magistrate restored.

Solicitors: *D. A. Devadason; Allen, Gledhill & Ball.*

PUBLIC PROSECUTOR v. LIM AH LENG

[R.Cr.J. (Ong Hock Sim J.) February 21, 1967]
[Penang — Criminal Revision No. 3 of 1967]

Criminal Law and Procedure — Sentence — Excessive — Previous offence committed 14 years earlier when accused was 10 years old — Courts Ordinance, 1948, s. 87(2).

Penal Code, s. 83 — Effect in passing sentence.

This was a reference by a magistrate under section 37 of the Courts of Judicature Act, 1964 for confirmation of sentence passed in exercise of the special powers of punishment conferred by section 87(2) of the Courts Ordinance, 1948. The accused was at the time of the trial 24 years old and had had two previous convictions one of which was for theft committed when he was 10 years old. The magistrate in view of the two previous convictions, sentenced him *inter alia* to two years imprisonment.

Held: in view of section 83 of the Penal Code the accused could not have had sufficient maturity when the previous offence was committed. The sentence of two years imprisonment was therefore severe and did not merit the invocation of the provisions of section 87(2) of the Courts Ordinance, 1947 and a sentence of one year's imprisonment substituted.

CRIMINAL REVISION.

Ong Hock Sim J.: This case was referred to me by the learned magistrate for confirmation of the sentence which has been passed upon the respondent in excess of that prescribed as required by section 37 of the Courts of Judicature Act 1964. In view of his two previous convictions the learned magistrate had sentenced the respondent to two years imprisonment. The respondent is now 24 years of age. I find that the magistrate took into account one offence in the Juvenile Court on 11th December, 1952, 14 years ago when the respondent was only 10 years old for an offence of theft and he was sent to an approved school for 3 years. The magistrate must have considered this previous conviction so serious as to merit invoking the provisions of section 87(2) of the Courts Ordinance, 1948 for the purpose of enhancing the sentence. I do not, and am a little shocked at the severity thereof having in mind section 83 of the Penal Code which reads:—

"Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion."

I wondered if the lad had sufficient maturity then. I also question the propriety of the registration of this offence under the Registration of Criminals Ordinance 1948 and order that it be expunged.

I therefore do not confirm the sentence of 2 years' imprisonment. I reduce it to one year and I set aside the fine and the order of police supervision.

Sentence altered.